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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 851

WHITELIGHT PRODUCTS DIVISION OF WHITE METAL ROLLING AND STAMPING CORP., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 25a-34a) is reported at 298 F. 2d 12. The Board's decision and order (Pet. App. 1a-24a) are reported at 131 NLRB No. 158 (R. 165-183, 186-192).[1]

[1] "R." refers to the Joint Appendix filed with the court below.

JURISDICTION

The judgment of the court of appeals was entered on January 15, 1962 (Pet. App. 26a). The petition for a writ of certiorari was filed on April 9, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an employer who refused to bargain collectively with the union actually designated as their representative by a majority of his employees in an appropriate unit, despite the union's request and offer to prove its majority by signed authorizations, and who then resorted to flagrant unfair labor practices to break up the union, may be held to have violated Section 8(a)(5) of the National Labor Relations Act and be ordered to bargain with the union.

STATUTES INVOLVED

The relevant statutory provisions are set forth at pp. 35a-39a of the appendix to the petition.

STATEMENT

A. The Board's Findings of Fact

The events herein involve the Company's manufacturing plant in North Walpole, New Hampshire, which was opened in March 1960 (R. 165-166; 28-29).[2] On Monday, August 15, 1960, employee Donald

[2] The Company is a New York corporation engaged in the manufacture of aluminum and magnesium rough forms and

Belden obtained Union authorization cards from Hugh Harley, Jr., a representative of the Union (R. 167; 6, 151).[3] On August 16 and 17, with the help of employees Clinton Pecor, Roland Prouty, and Sylvester Smith, the cards were distributed among the Company's employees, and were signed by 18 of the 24 employees in the plant (R. 167; 6). On August 17, these 18 employees elected an organizing committee consisting of Belden as chairman, and Pecor, Prouty, Sylvester Smith, Bernard Smith, Roger Canfield and John Benjamin (R. 167; 6). The committee, accompanied by organizer Harley, then informed Plant Manager Earl Records that a substantial majority of the production and maintenance employees had signed Union cards, and asked that the Union be recognized as the employees' bargaining representative. Harley offered to prove the Union's majority status by showing the cards, by holding an election, or by whatever other means Records might deem appropriate. Records replied that he would not recognize the Union at that time, but that, if Harley would return on Friday, August 19, he would be given an answer. Upon Harley's request, Records promised not to interfere in the meantime with the employees' right to organize. (R. 167-168; 8-9, 151-152.)

After the meeting, Records called Belden into his office, and, in the presence of Foreman Humphrey,

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finished products. In addition to its North Walpole plant, the Company operates plants in Warsaw, Indiana, and Brooklyn, New York. (R. 165-166; 19, 27-28.)

[3] United Electrical, Radio & Machine Workers of America.

warned Belden that "Harley and the Union were Communists," and that if Belden "continued to participate in the activities that [he] would be branding [him]self for life and in the future." Records also told Belden "that there was no need for the Union in the shop because if the Union came in [the employees] would no longer have * * * monthly raises, and * * * would have another 30-day trial period" at the end of which they "would not have been able to make the quota that would have been set." Records pointed out that the Company was losing money, running behind in its work, and could not afford any slackening in production. Records asked Belden to reconsider his position on the Union and to convey management's views to the rest of the committee which, as Belden had informed Records, was to meet that night at the home of Sylvester Smith. (R. 168; 8-9, 22-23.)

Later that afternoon, Foreman Lemp asked Benjamin (a committee member) what he thought of the Union, and added that, if the Union came in, the plant might be closed down (R. 168; 58-59). That evening, while the committee met at Sylvester Smith's home, Records drove slowly by the house on two occasions, each time looking in the window (R. 168-169; 9-10, 24-25, 46-48).

The next day, August 18, Foremen Lemp and Humphrey interrogated six or eight of the employees in the plant as to their Union sympathies and activities (R. 169; 11). Belden learned of this, and along with another committee member, Canfield, went to Records and asked him to honor his earlier promise

to Harley not to interfere with the organizational activity. Records replied, "Do you realize you are jeopardizing your job by coming in here?" (R. 169; 11-12). Belden told Harley of the interrogation and the conversation with Records. Harley went to Records and asked him to honor his promise not to interfere with the men. Harley also asked Records whether he was ready to recognize the Union, and Records again told Harley that he would have an answer the next day (R. 169; 152-153).

On the same day, Records told Benjamin, who had asked for a raise, that, if the Union came in, there would be only one raise a year and that would amount to a dime (R. 169; 59). Moreover, Bernard Smith (another committee member) was summoned to Records' office, and told by him that, if the Union came in, there would no longer be monthly raises, for the Union would only allow one raise a year and the men would have to fight for that; that, if the Union came in, the men would only have work eight months a year, instead of twelve months (R. 169; 49-50).[4]

Later the same day, August 18, Records discharged Belden. Records gave two reasons: first, that Belden had not been attending to his work; second, that,

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[4] Similarly, Foreman Lemp told employee La Duke that in other shops he knew unions were not working out, and suggested that, if La Duke voted no, the whole shop would be better off. Lemp warned La Duke that if the Union came in there would be no monthly raises and there would be work only eight months of the year. Finally, Lemp asked La Duke to give him an answer that night as to how he intended to vote. (R. 169; 67-68.)

when Belden had applied for a job with the Company, he had falsified his application form (R. 170; 12).[5] Moreover, Plant Manager Wickberg summarily discharged Sylvester Smith. Wickberg told Smith that he had been spending too much time in the rest room, that his work was not satisfactory, and then commented, "You know what Mr. Lawson [the Company's general manager] said about the union business? * * * His first words were 'Ha, Ha, Ha.'" (R. 170-171; 45). About the same time, Foreman Lemp laid off employees Bernard Smith, Brodeur, Pecor, and Prouty (R. 170-171; 50, 56, 57). Lemp told Smith that he was being laid off "due to production" (R. 171; 50); he told Brodeur that the Company was "cutting production" and had to lay him off, and added, "Probably, when this blows over, they will hire you back" (R. 171; 56); and he told Pecor that the layoff was "due to things that are happening here" (R. 171; 58).

The next day, August 19, Foreman Lemp told employee Shafer that, if the Union came in, the Company would stop paying for the insurance program, and the men would have to carry their own. Lemp

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[5] Belden had left blank on his application form a question relating to arrests, convictions, etc., and had indicated in answer to a question relating to military service that he had been in the Air Force for about four years. Records subsequently discovered that Belden had a prison record, and that he had only served 13 or 14 months in the Air Force and had been less than honorably discharged. Confirmation of Belden's criminal record was received by Records the morning of Belden's discharge. (R. 174-176, 187-188; 158-161, 83-89, 164.)

added, "I hate to fire anybody, but when I get the word from the bigger boss, I got to do it. You see what happened here yesterday.' He also pointed out to Shafer that there were "7 or 8 people out on the street now that would vote for the Union." (R. 171; 63-65.) Later that day, Records asked employee Fair to reconsider his position on the Union, telling Fair that the Company provided insurance for the workers, and that, if the Union came in, there would be only one raise a year and that would amount to a nickel (R. 171; 61-63).

On the afternoon of August 19, Union Organizer Harley went to Records and objected to what he considered to be the discriminatory discharges and layoffs of the previous day. Harley asked Records whether he was ready to accept the Union as the bargaining agent of the Company's employees. Records replied that Harley, by filing a petition with the Board, had obviated the need for any statement from him, and that he, therefore, would not now recognize the Union (R. 171-172; 106-107, 153-154). The Union had filed a petition for an election with the Board on August 18, which was subsequently withdrawn (R. 155-157).

B. The Board's Conclusions and Order

Upon the foregoing facts, the Board found that the Company violated Section 8(a)(1) of the Act by interrogating its employees about their union activities, by threatening them with economic reprisals, as well as promising them benefits, in order to undermine their organizational efforts, and by engaging

in surveillance of a Union meeeting. Further, the Board found that the Company discriminated, in violation of Section 8(a)(3) and (1), by discharging employee Sylvester Smith and by laying off employees Bernard Smith, Pecor, Prouty, and Brodeur. The Board dismissed the complaint, however, insofar as it alleged that the discharge of employee Belden was discriminatory (R. 178-179, 187-188). Finally, the Board found that, on and after August 17, 1960, the Union represented a majority of the employees in an appropriate unit and that the Company refused to bargain with it, in violation of Section 8(a)(5) of the Act (R. 177-178; 187-188).

The Board ordered (R. 188-192) the Company to cease and desist from the unfair labor practices found, and from in any other manner interfering with, restraining or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act (R. 188-189). Affirmatively, the Board required the Company to bargain with the Union upon request, to reinstate with back pay the discriminatorily discharged or laid off employees, and to post appropriate notices (R. 189-192).

C. The Decision of the Court of Appeals

The court of appeals affirmed the Board's finding that the Company, by refusing to recognize the Union when it offered the card check, violated Section 8(a)(5) of the Act, and accordingly enforced the Board's order requiring the Company to bargain with the Union upon request (Pet. App. 29a-31a, 34a).

The court also affirmed the Board's findings as to

the Section 8(a)(1) violations (excepting the surveillance finding), as well as the finding that the Company discharged employee Sylvester Smith because of his Union membership and activity in violation of Section 8(a)(3) and (1) (Pet. App. 28a, 31a, 34a). As to the remaining four laid off employees, the court, concluding that the Board's finding of discriminatory motivation could not be sustained on the grounds assigned by the Board but that there appeared to be other grounds for supporting it, remanded that phase of the case to the Board for further consideration (Pet. App. 31a-32a, 34a).*

ARGUMENT

Petitioner's basic contention (Pet. 2, 6-11) is that the Board's bargaining order is invalid because the Union's majority status was not established in a Board conducted election. Petitioner maintains that a union cannot establish that it has been selected as the bargaining representative by a majority of the employees in an appropriate unit by means of authorization cards signed by the employees, but only through a formal Board election. This view is contrary to settled authority; there is no conflict of decisions; and no question warranting review by this Court is presented.

1. Section 8(a)(5) of the Act requires the employer "to bargain collectively with the representa-

* The court also upheld the Board's finding that employee Belden was not discriminatorily discharged, and accordingly denied the Union's petition for review on that issue (Pet. App. 32a-34a).

tives of his employees, subject to the provisions of section 9(a)." Section 9(a) provides that "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining . . . ." Although Section 9(c)(1) provides machinery by which the question of representative status may be determined in a Board conducted election, it has long been settled that an election is not the only means by which representative status may be established. See *United Mine Workers* v. *Arkansas Oak Flooring Company*, 351 U.S. 62, 71-72, and cases cited in n. 8 therein. Both before and after the 1947 amendments to the Act, the courts have uniformly held that, where a union has obtained authorization cards signed by a majority of the employees in an appropriate unit, the employer, absent a good faith doubt as to the reliability of the cards, violates Section 8(a)(5) of the Act if he refuses to recognize and bargain with the union.[7]

On the facts in the present case, the Board was fully warranted, as the court below found (Pet.

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[7] See *National Labor Relations Board* v. *Dahlstrom Metallic Door Co.*, 112 F. 2d 756, 757 (C.A. 2); *National Labor Relations Board* v. *Parma Water Lifter Co.*, 211 F. 2d 258, 261 (C.A. 9), certiorari denied, 348 U.S. 829; *National Labor Relations Board* v. *Southeastern Rubber Mfg. Co.*, 213 F. 2d 11, 15-16 (C.A. 5); *National Labor Relations Board* v. *Hunter Engineering Co.*, 215 F. 2d 916, 920-923 (C.A. 8); *National Labor Relations Board* v. *I. Taitel and Son*, 261 F. 2d 1, 4-5 (C.A. 7), certiorari denied, 359 U.S. 944.

29a-30a), in concluding that the Union, at the time it requested recognition as the bargaining representative, had designation cards signed by a majority of the employees in an appropriate unit; and that the Company refused recognition, not because of a good-faith doubt as to the Union's status, but in order to gain time in which to undermine that status. Thus, on August 17, 1960, just after 18 of the 24 employees signed cards authorizing the Union to represent them, Union Organizer Harley and an employee committee went to Plant Manager Records, told him that a substantial majority of the employees had signed Union cards, and asked that the Union be recognized as the employees' representative. They offered to prove the Union's majority status by showing the cards which were in their possession, or by any other means Records thought appropriate, including an election. Records did not express any doubts concerning the authenticity of the authorization cards, or the appropriateness of the unit for which recognition was requested. He merely declined to recognize the Union at that time, stating that he would give Harley an answer on August 19. Then, despite a promise that there would be no interference with the organizing drive in the meantime, Records and other Company representatives embarked on a program of interrogation, threats and promises of benefit designed to force the employees to repudiate the Union, and climaxed it by discriminatorily discharging and laying off some of the Union leaders. (See the Statement, *supra*, pp. 3-7.) In these circumstances, a bargaining order was clearly justified.

See *Scobell Chemical Co.* v. *National Labor Relations Board*, 267 F. 2d 922, 924-926 (C.A. 2); *Joy Silk Mills, Inc.* v. *National Labor Relations Board*, 185 F. 2d 732, 741-745 (C.A. D.C.), certiorari denied, 341 U.S. 914.

2. A contrary conclusion is not required by the fact (Pet. 9-11) that, although Section 9(c) of the Wagner Act (49 Stat. 449, 453) permitted the Board to "take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives," Congress, in amending the Act in 1947, deleted the latter option. This amendment merely related to the conditions under which a formal Board certification of representative status was to be obtained, and not to the issue whether representative status may be based on something other than a Board certification. The amendment was not intended to disturb the settled rule that the obligation to bargain is not necessarily dependent upon a Board certification, but was rather intended to preclude the Board from issuing a certification on a basis other than a Board election, as it sometimes did under the Wagner Act. See the cases cited note 7, *supra*, p. 10; *Ray Brooks* v. *National Labor Relations Board*, 348 U.S. 96, 101.*

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* In *Ray Brooks*, the Court observed that, under the amendment to Section 9(c), "Board certification could only be granted as the result of an election," but added, "though an employer would presumably still be under a duty to bargain with an uncertified union that had a clear majority." It cited, in the latter regard, *National Labor Relations Board* v. *Kobritz*, 193 F. 2d 8 (C.A. 1), where majority status had been based on authorization cards.

3. The decision in the present case does not conflict with *National Labor Relations Board* v. *Adhesive Products Corp.*, 281 F. 2d 89 (C.A. 2), and the other related cases relied on by petitioner (Pet. 11-12), in which the court conditioned a bargaining order upon the union's demonstrating in a Board election that it continued to have the support of a majority of the employees. Those decisions turn on special facts which are not present here. Indeed, as petitioner notes (Pet. 12), those decisions are distinguished on the basis of their special facts in *National Labor Relations Board* v. *Philamon Laboratories, Inc.*, 298 F. 2d 176 (C.A. 2), petition for certiorari filed, this term, No. 909, in which, in a situation similar to that here, the court enforced an unconditional bargaining order.

Moreover, petitioner is not aided by the other cases which it relies on (see Pet. 9, 13). In *Franks Bros. Co.* v. *National Labor Relations Board*, 321 U.S. 702, the Court held that, where a union's majority has been dissipated by the employer's unfair labor practices, the Board may, as a remedy for the unfair labor practices, require the employer to bargain with the union for a reasonable period notwithstanding that the union no longer represents a majority of the employees. There is no showing here that, as a result of the unfair labor practices, the Union lost the majority which it had among the Company's employees, but, even if there had been such a showing, *Franks* would only demonstrate the propriety of a Board bargaining order. As for *Garment Workers* v. *National Labor Relations Board*, 366 U.S. 731, the Court simply held that it is an unfair labor prac-

tice for an employer to accord exclusive recognition to a union which in fact represents only a *minority* of the employees. That case certainly is not authority for allowing an employer to withhold recognition from a union which, like the Union here, did in fact represent a *majority*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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MAY 1962.